

JUL 20 2017

IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

JUL 20 2017

CLERK

XPO LOGISTICS FREIGHT, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

Case No. 17-1177

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, XPO Logistics Freight, Inc. (herein "Petitioner") hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of an Order of the National Labor Relations Board (herein "Respondent" or "NLRB") in the matter styled XPO Logistics Freight, Inc., and Teamsters Local Union No. 179, Case No. 13-CA-196637, reported in a Decision and Order at 365 NLRB No. 105, dated July 6, 2017. *See Exhibit A* attached hereto. The Corporate Disclosure Statement is attached as **Exhibit B**.

This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act because the NLRB's Decision and Order is a final

order. 29 U.S.C. §160(f). Petitioner is a party aggrieved by said Decision and Order. Venue in this Court is proper pursuant to 29 U.S.C. §160(f).

The NLRB's Decision and Order against Petitioner is not supported by substantial evidence and is contrary to law. Respondent is not the properly certified representative of the employees in question and Petitioner is not obligated under Section 8(a)(5) of the Act to bargain with a union that has been improperly certified.

WHEREFORE, Petitioner respectfully prays that this Court review and set aside the Decision and Order of the NLRB which found that Petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §158(a)(5) and (1), and receive any further relief to which it may be entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

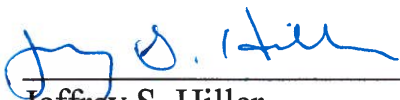
It is hereby certified that the foregoing Petition for Review, Decision, and Corporate Disclosure statement were served via email and Federal Express overnight delivery on July 19, 2017 to the following individuals:

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Jennifer Abruzzo, Deputy General Counsel
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Dated: July 19, 2017



Jeffrey S. Hiller

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

XPO Logistics Freight, Inc. and Teamsters Local Union No. 179. Case 13–CA–196637

July 6, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 11, 2017, by Teamsters Local Union No. 179 (the Union), the General Counsel issued the complaint on April 13, 2017, alleging that XPO Logistics Freight, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 13–RC–184190. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On April 27, 2017, the General Counsel filed with the National Labor Relations Board a Motion for Summary Judgment. On May 4, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Union was improperly certified because the Union's supporters and/or agents threatened, intimidated, and/or coerced employees and created a general atmosphere of fear and coercion during the critical period and interfered with employees' ability to make a free and uncoerced choice.¹

All representation issues raised by the Respondent were or could have been litigated in the prior representa-

¹ In its response to the Board's Notice to Show Cause, the Respondent also reiterates arguments raised in its preelection statement of position that the Board's Representation Case Rules (effective April 14, 2015) violate the Administrative Procedures Act, the spirit, intent and language of the NLRA, and employers' due process rights.

tion proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Aurora, Illinois, and has been engaged in the business of interstate freight transportation, including to and from the Respondent's facility.

In conducting its operations during the calendar year preceding the issuance of the complaint, the Respondent purchased and received goods, products, and materials valued in excess of \$50,000 at the Respondent's facility directly from points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.³

² The Respondent's request that the complaint be dismissed is therefore denied.

Chairman Miscimarra would have granted the Employer's request for review with respect to the Regional Director's decision to overrule, without a hearing, Objection 1, which alleges union supporters and agents harassed employees, Objection 2, which alleges a vocal pro-union employee told another employee to "go fuck [him]self," and Objection 4, which alleges prounion agents "got in [the] face" of an employee who disposed of union literature. While he remains of that view, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

³ The Respondent's answer denies the complaint paragraphs alleging that the Respondent has been an employer engaged in commerce within the meaning of the Act, that the Union is a labor organization within the meaning of the Act, and that the unit is appropriate. However, in the underlying representation proceeding, the Respondent stipulated that it is engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, that the Union is a labor organization within the meaning of Sec. 2(5) of the Act, and that the unit is appropriate for the purposes of collective bargaining. Accordingly, we find that the Respondent's denials do not raise any issue warranting a hearing. *All American Service & Supplies*, 340 NLRB 239, 239 fn. 2 (2003).

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on October 12, 2016, the Union was certified on November 2, 2016,⁴ as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time city drivers, road drivers, and hostlers (spotters).

Excluded: All other employees, dock workers, mechanics, janitors, managers, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

By letter dated November 8, 2016, and email dated April 6, 2017, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since November 8, 2016, the Respondent has failed and refused to bargain with the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since November 8, 2016, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry*

⁴ On April 5, 2017, the Board (Chairman Miscimarra, dissenting in part) denied the Respondent's request for review of the Regional Director's Decision and Certification of Representative.

Co., 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, XPO Logistics Freight, Inc., Aurora, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters Local Union No. 179 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time city drivers, road drivers, and hostlers (spotters).

Excluded: All other employees, dock workers, mechanics, janitors, managers, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Aurora, Illinois, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

XPO LOGISTICS FREIGHT, INC.

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any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 8, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 6, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on
your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Teamsters Local Union No. 179 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

Included: All full-time and regular part-time city drivers, road drivers, and hostlers (spotters).

Excluded: All other employees, dock workers, mechanics, janitors, managers, confidential employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

XPO LOGISTICS FREIGHT, INC.

The Board's decision can be found at www.nlrb.gov/case/13-CA-196637 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



CORPORATE DISCLOSURE STATEMENT

Petitioner XPO Logistics Freight, Inc. is a wholly owned subsidiary of XPO CNW, Inc. The sole shareholder of XPO CNW, Inc. is the publicly-traded corporation XPO Logistics, Inc. No publicly held company owns 10% or more of the stock of XPO Logistics, Inc.